

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
ELLIOTT, : 18-cv-05680-LDH-SJB
Plaintiff, :
 :
- versus - : U.S. Courthouse
 : Brooklyn, New York
 :
 :
DONEGAN, et al., : July 23, 2020
Defendants : 2:01 PM
-----X

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE SANKET J. BULSARA
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

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1 THE COURT: Good afternoon. This is Judge
2 Bulsara.

3 We're here for a status conference in 18-cv-
4 5680.

5 Who do we have here for the plaintiff?

6 MR. LEWIS: Good afternoon, Judge Bulsara.

7 Nick Lewis for plaintiff, Stephen Elliott, and
8 good afternoon, counsel.

9 THE COURT: Good afternoon.

10 Who is here for the defendant?

11 MR. MATZ: Your Honor, this is Joshua Matz for
12 the defendants, and I'm joined by my colleague, Roberta
13 Kaplan, from Kaplan Hecker & Fink, LLP.

14 THE COURT: Good afternoon.

15 So we're here primarily to discuss the status
16 of discovery on the narrow issue that has been identified
17 by Judge DeArcy Hall's opinion, and I've received the
18 parties letters. And it appears, at least from both
19 letters, that the parties wished to first conduct some
20 amount of document exchange, and then proceed to a
21 deposition. Is that as opposed to, for instance, moving
22 forward with the affidavit and deposition first? Is that
23 fair?

24 MR. LEWIS: For plaintiff, your Honor, yes,
25 that is fair.

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1 MR. MATZ: Yes, for the defendant as well, your
2 Honor.

3 THE COURT: Okay. So I have -- you know, the
4 typical practice would be for the plaintiff or the party
5 seeking documents to serve a document request for there
6 to be a response, and objections, and if following meet
7 and confer, there was no agreement about either
8 objections, or additional production, or other similar
9 issues, the parties seeking documents could move to
10 compel.

11 And I gather also that the parties, you know,
12 within a certain amount of time, wished to do that, as
13 well.

14 MR. LEWIS: That's correct from plaintiff's
15 side, your Honor.

16 MR. MATZ: Yes. Yes, your Honor.

17 THE COURT: Okay. So -- and let me ask the
18 plaintiff's counsel this, is the document request and
19 interrogatories, the ones that you've provided in your
20 letter, those are the ones you plan on serving?

21 MR. LEWIS: Yes, sir.

22 THE COURT: Okay. So now, I normally wouldn't
23 do this, but I don't want this process to take a long
24 period of time but, you know, obviously we haven't heard
25 the defendant's objections, but just some observations,

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1 the document requests strike me as quite broad, and you
2 would have to, if this came to a motion to compel,
3 explain to me how the document requests would -- are any
4 different than what you would serve if the issue in
5 discovery were the entirety of the case, right?

6 We have a narrow issue on which discovery is to
7 be conducted, and if I were to -- just reading your
8 document requests, they seek all kinds of information
9 about, for example, all contributors to content in the
10 list, and a defamation claim has to be content statement
11 of concerning a plaintiff. And so for example, it's not
12 clear to me why information about all contributors to the
13 list, or -- would be relevant in the case generally, but
14 it's certainly not relevant to the narrow issue on
15 whether immunity attaches for the specific, we'll call
16 it, items in the list, or the spreadsheet that pertain to
17 the plaintiff.

18 So I would urge you strongly to look at the
19 scope of what you've sought, and seek to narrow to them
20 to the issues because they strike me as exceedingly
21 broad.

22 MR. LEWIS: Noted, your Honor. I would say as
23 far as just that one particular issue about all
24 contributors, it's my understanding, and now opposing
25 counsel has committed to writing, the fact that Ms.

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1 Donegan did, in fact, delete documents that could very
2 well be relevant to the CDA issue, in particular, whether
3 she -- the manner in which she encouraged the other users
4 to post towards the spreadsheet, so of course --

5 THE COURT: Let me understand that argument.
6 The argument is that knowing how the -- Ms. Donegan
7 interacted with other contributors, i.e., contributors
8 who did not provide information related to the entry for
9 Mr. Elliott, would help inform whether or not she in fact
10 materially altered, for example, information related to
11 Mr. Elliott's entry?

12 MR. LEWIS: Just the encouraging, whether or
13 not she materially altered, if -- and again, I'm somewhat
14 hamstrung because I don't have the (audio interference)
15 but for example, if in her encouraging users of the
16 spreadsheet, she were to say send a group email, instead
17 of one-by-one emails to those who access the list, I
18 would certainly suggest that the emails to not just the
19 person or people who access Mr. Elliott's cells on the
20 spreadsheet would be relevant.

21 And I also believe that because she deleted --
22 Ms. Donegan deleted the emails, and her Google account,
23 as far as I understand, that there's likely going to be
24 the need for some third-party discovery to see if we
25 can't obtain the emails she was sending to everyone, or

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1 singular people in particular. This is what -- I
2 can't --

3 THE COURT: Well, let's be clear, and maybe I
4 misunderstand what you're saying. If there's an email
5 that was sent to say ten people, one of whom was the
6 person or two of whom were the persons who gave
7 information related to your client, that email -- we
8 could talk about redaction in a second, would appear to
9 fall within the scope of the issue to be decided, but
10 it's not clear to me why -- because it's, in addition to
11 being an email to other people, it's also an email to
12 potentially the people who contributed to the entry in
13 question.

14 But it's not clear to me at all why emails to
15 people who -- that were not involved in the creation of
16 the content, or that's related to the entry at issue,
17 would be relevant at all, and certainly your document
18 request (audio interference) that information.

19 MR. LEWIS: Well, I guess, your Honor, I don't
20 know how I'd be able to differentiate which emails
21 specifically are -- I don't even know if Ms. Donegan
22 doesn't, in fact, know who posted to Mr. Elliott's cells,
23 I won't speak for Ms. Donegan's counsel, but if that is a
24 position that Ms. Donegan is taking, then I don't know
25 how we would -- how any of us would be able to

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1 differentiate who exactly is the relevant person in the
2 email.

3 THE COURT: So that only proves my limitation,
4 it doesn't undercut it, right? If the position is, and
5 this is why I am wondering whether we wanted to have the
6 affidavit submitted first, if the position is that she
7 doesn't remember who contributed, or doesn't know who
8 contributed to which entry, then knowing with whom she
9 interacted is not going to help you in figuring out
10 whether the immunity applies, because there's no basis to
11 tie that particular email, or that particular
12 communication to the particular entry involving your
13 client.

14 And the question of immunity turns solely on
15 what she says she did, or what she says she didn't do.

16 MR. LEWIS: Well, I would disagree with that,
17 your Honor, because I think if there's no way of finding
18 that out, then we might have a spoliation issue.

19 THE COURT: Well, that's a different question.
20 That's a different question than whether or not --

21 MR. LEWIS: And that --

22 THE COURT: -- well, you can make these
23 arguments in response to whatever objections there, but
24 it strikes me that there is little difference than in the
25 document requests that you've propounded, than what would

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1 the document discovery, save for damages, in the entirety
2 of the case.

3 And so, I am not inclined to make this a full-
4 blown discovery exercise into the entirety of the case,
5 and you'll have to come up with more than spoliation to
6 suggest -- you know, logical inference, or other kind of
7 factual argument to say why information about entries
8 made by others, or information by entries concerning
9 others -- people other than your client would be
10 pertinent or relevant to this immunity issue. Does --

11 MR. LEWIS: May --

12 THE COURT: Go ahead.

13 MR. LEWIS: -- may I ask just the question,
14 just so I'm clear, your Honor, is information regarding
15 the actual deletion of whether emails or other documents,
16 are those -- would you deem those requests to be relevant
17 for the CDA examination?

18 THE COURT: Let me make sure I understand
19 before I -- meaning, information about, for example,
20 whether emails that we were just talking about, right,
21 let's say they were --

22 MR. LEWIS: Yes.

23 THE COURT: -- concerning your client's entry,
24 or the entry concerning your client, whether those emails
25 were deleted or not.

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1 MR. LEWIS: Yes, sir.

2 THE COURT: Okay. I can see an argument for
3 why there would be -- appropriate to understand because
4 it goes to the nature of the communications, but -- so
5 I'm not going to -- you know, as to whether we are
6 deciding spoliation --

7 MR. LEWIS: I understand we're not there yet.

8 THE COURT: -- and whatever consequences may
9 accrue to that, that I think is well beyond, but I can,
10 you know -- because it goes to the practices of what may
11 have been done with respect to information that's
12 pertinent to the ultimate immunity question --

13 MR. LEWIS: Sure.

14 THE COURT: -- I think that would be fair to
15 inquire about. But so, let me hear from the defendants
16 on any of these points, to make sure I have not
17 misunderstood any of the predicate dynamics, as well as
18 the scope of the immunity question.

19 MR. MATZ: Thank you, your Honor. We
20 appreciate that. The colloquy that you just engaged in
21 with Mr. Lewis will be familiar to him because it's
22 almost verbatim, the colloquy that I engaged in with him
23 about two weeks ago, when I pointed out that the judge's
24 order did not -- Judge DeArcy Hall's order did not
25 contemplate comprehensive, unilateral discovery against

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1 Ms. Donegan, but that it instead contemplated narrow
2 discovery, limited solely to the four very specific
3 factual questions that relate to the issue of CDA
4 immunity, and obviously the document requests described
5 in Mr. Lewis' letter, come nowhere close to adhering to
6 those boundaries.

7 Most notably, they're not limited in time in
8 any way for example, to the period of October 10th to 12,
9 which is when the underlying events, in fact, occurred.

10 And your Honor raised two other points that I
11 would briefly address.

12 THE COURT: I'm sorry, on that point, let me
13 just make sure I understand that last point. October
14 10th through 12th is the period of time when the Google
15 spreadsheet was online, and people could make changes,
16 contributions, alterations, whatever, obviously the
17 characterization is something to be decided, but that's
18 what you mean by the October 10 through 12 period?

19 MR. MATZ: Yes, and I was actually being
20 generous. It was only online for twelve hours on October
21 11th of 2017, but I was seeking to -- I was referring
22 generally to the period of time in which any of the
23 underlying communications that Mr. Lewis is talking
24 about, and that I believe Judge DeArcy Hall's order
25 concerns, any of those would, in fact, have occurred

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1 within that period.

2 THE COURT: Okay. Well, I just want to make
3 sure of one point though, and if I have misunderstood the
4 immunity, please let me know. I mean, isn't it possible
5 that if someone has information that they received on
6 days prior, they put the spreadsheet up, and they
7 populate the information they received say on October
8 1st, into the spreadsheet, that that goes to -- knowing
9 what happened on October 1st, goes to the immunity
10 question, even though it's not the period in which that
11 spreadsheet was live, right, unless -- and obviously,
12 there has to be some reasonable bound to that, but you
13 know, I think it would -- unless there's some evidence,
14 right, that when the spreadsheet, for example, was put
15 online, there was nothing in it.

16 But if the point is -- and obviously we're
17 talking about the entries of, or concerning Mr. Elliott,
18 don't we need to know when that information was received,
19 as it were?

20 Now it may be that your client didn't "receive"
21 information in the sense of getting it beforehand, and
22 you may know that or not know that, but do you understand
23 the point?

24 MR. MATZ: I completely understand the point,
25 and your Honor is of course correct, the information she

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1 received earlier in time than the posting of the
2 spreadsheet on the internet could bear on the CDA
3 immunity issue, which as Judge DeArcy Hall defined it,
4 relates specifically to the Elliott entries on the list.

5 And I agree with you also that you would want a
6 reasonable period of time for any such search, if one
7 were to go looking for such documents.

8 I was highlighting in some respects, the fact
9 that Mr. Lewis' position extended to the present, and
10 would cover every communication that Ms. Donegan had,
11 that in any way relates to anything having to do with the
12 list, or anyone on the list, or anyone who maybe glanced
13 at it, you know, out of the side of their eye, both the
14 period in which the list was active through the present.

15 I was merely noting the lack of a temporal
16 limitation, as well as the fact that the requests on
17 their face cover many items that lack relevance to the
18 specific question that Judge DeArcy Hall identified. And
19 (indiscernible) --

20 THE COURT: Let me just --

21 MR. MATZ: Sorry.

22 THE COURT: Oh, sorry. Let me just pause on
23 the time frame question because if we can hammer that out
24 now, it's better we do that as opposed to waiting to
25 solve, you know, issues that -- so we can move through

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1 this discovery promptly, and I'll hear from the plaintiff
2 on this.

3 Why is it, you know, pertinent to the immunity
4 question, communications that are years after the fact?
5 Now I recognize this may be a standard request, right,
6 and it may be simply a function of that, but we are
7 talking about creation of information in 2017, if I have
8 the year correct, and we're talking about, you know, if
9 we think about publication as it relates to a defamation
10 claim, the publication occurred in that period of time,
11 and obviously some -- there might be communications
12 shortly thereafter, which bear upon how the information
13 was obtained or however, I know the plaintiff will
14 disagree about that means exactly but are you prepared to
15 limit the time frame?

16 MR. LEWIS: Well, your Honor, I think there are
17 some requests, or some potential documents that it would
18 be limiting the time frame could exclude, for example,
19 Ms. Donegan discussing what she did, and the conduct she
20 did surrounding the list, which we know she, at a
21 minimum, wrote an article in which she described the
22 conduct she did in and around the list that could be
23 relevant, so beyond just communications, we have a writer
24 who has written about specifically what she did, and
25 they're -- so for example, if there was an essay what she

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1 did in the lead up to the list being published, even in
2 the days leading up to it, if she was encouraging people
3 through her personal communications, whether speaking,
4 texting, social media messaging, emails, her statements,
5 her own statements about the conduct she undertook would
6 be relevant right up till today.

7 THE COURT: Well, I'm not sure that that's
8 right, but let's think about this in a slightly different
9 way, right? This is an affirmative defense. The burden
10 of production and persuasion is from the defendant,
11 right? Is that the defendant's position?

12 MR. MATZ: Yes.

13 THE COURT: So is your client willing to come
14 forward with the affidavit first?

15 MR. MATZ: Yes, your Honor. She would be
16 willing to come forward with the affidavit first.

17 THE COURT: Because I do think some of these
18 issues can be foreclosed quite quickly because you are
19 the one putting forth the defense, and obviously the
20 plaintiff is entitled to attempt to defeat the defense,
21 but some of this is informed by, I think, what exactly is
22 being asserted in asserting the defense, and it may
23 obviate some of these, and I don't want to call them
24 speculative, but where we don't know exactly what -- for
25 example, if the affidavit were to say, let's -- just to

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1 be clear, right, in no communication after say January 1,
2 2018, did Ms. Donegan communicate with any third-party
3 about the information related to, or concerning Mr.
4 Elliott, you know, going down a long expiration about,
5 and having her turn over all of the essays, writings,
6 drafts, et cetera, seems to me less likely to contain
7 pertinent information, and it maybe wholly
8 disproportionate under Rule 26.

9 So if you're willing to do that, I think it may
10 at least obviate some of these, I would hope, some of
11 these document issues.

12 MR. MATZ: Yes, your Honor, we understand, you
13 know, and just to clarify one minor point in what your
14 Honor just said, you know, it would be true, I expect,
15 that Ms. Donegan would testify that she has not
16 communicated with anybody about the provenance of the
17 entries on the list concerning Mr. Elliott because as you
18 will find when she gives her affidavit, she did not
19 fabricate it, and does not know who did.

20 Certainly after Mr. Elliott sued her, it is
21 conceivable that there are communications she has
22 received from others, who have opinions as to the
23 underlying truth of the allegations, or who have opinions
24 about Mr. Elliott's decision to sue her for it, but
25 neither of those things, it's my understanding, would be

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1 relevant to the narrow fact question of what happened on
2 and before October 11th with respect to the Elliott
3 entries.

4 And so fr that reason, she absolutely could,
5 and would in her affidavit, address the issues respecting
6 CDA immunity, and could make representations that she has
7 not communication subsequently about the provenance of
8 the Elliott entries, or how they specifically encouraged
9 anyone to defame Mr. Elliott.

10 But obvious -- I just wanted to flag that one
11 minor point, that there may be other people who have
12 communicated with her about Mr. Elliott who very publicly
13 sued her, but that they wouldn't relate to the CDA issue.

14 THE COURT: I agree, and this is why I thought
15 some of the requests were overbroad. So just to take --
16 and again, when I was speaking earlier about
17 representations, I was obviously talking about
18 hypothetically.

19 You know, I don't know what the underlying
20 facts are but hypothetically, there is a-- you know, if
21 there were communications about -- with third parties
22 about Mr. -- about the entries concerning Mr. Elliott,
23 and those communications came to your client, those -- if
24 we were doing discovery about the entire case, okay,
25 those communications would be within the heartland of a

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1 relevant proportion of the discovery request.

2 If however, in this context, however, the
3 communications are only relevant proportional, if for
4 instance, the substance of that email went to whether she
5 changed the substance of information she received about
6 Mr. Elliott, or whether she just inputted it, or -- et
7 cetera.

8 In other words, the process by which the
9 information was contained in the October spreadsheet. I
10 hope that makes sense to both parties.

11 MR. MATZ: It makes sense to the defense, your
12 Honor.

13 MR. LEWIS: Well, I missed the -- it did not
14 make sense to me, your Honor, only because I think I
15 might have missed a portion of --

16 THE COURT: Sure. For instance, as to the
17 question of -- just to differentiate discovery that's
18 appropriate for the narrow issue here, and discovery
19 that's appropriate case-wide, okay, let's say after
20 October of 2017, a third-party email Ms. Donegan, right
21 -- I may be mispronouncing everyone's name, so I
22 apologize, emailed Ms. Donegan, and inquired about the
23 entries relating to Mr. Elliott, okay?

24 If this case were full-on discovery about the
25 entries related to Mr. Elliott, that email and requests

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1 for it would be in the heartland of discovery, and you
2 would be entitled to it, it would be relevant, it would
3 proportional.

4 In this context, that email would only be
5 relevant, proportional, and be required to be produced if
6 it dealt with the immunity issues. I.e., if it dealt
7 with how she got the information, how she might have
8 dealt with the information with respect to October 2017.

9 For instance, if somebody emailed her and said
10 do you think this is true, okay --

11 MR. LEWIS: Uh-hum.

12 THE COURT: -- that's not a producible email in
13 this context.

14 MR. LEWIS: What the --

15 THE COURT: If the email on the other hand
16 said --

17 MR. LEWIS: I'm sorry to interrupt you.

18 THE COURT: Yeah. No, no, okay, just to clear
19 up the example -- and don't worry, it's an audio, people
20 interrupt all the time, it's okay, what's not -- what is
21 producible would be the -- well, when you got the
22 information about Mr. Elliott, what did you do with it,
23 and how did it end up on the spreadsheet.

24 MR. LEWIS: Okay.

25 THE COURT: That's a -- right? The two are

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1 different. The first would be if we're doing discovery
2 about the whole case. The second relates to immunity.

3 MR. LEWIS: I understand.

4 THE COURT: And so how long to produce the
5 affidavit?

6 MR. MATZ: Your Honor, we would propose two or
7 three weeks.

8 THE COURT: Okay. So if we said three weeks
9 for the affidavit, and then the parties to exchange
10 document requests and interrogatories two weeks after
11 that, is that sufficient time?

12 MR. MATZ: Yes, your Honor.

13 THE COURT: And so --

14 MR. LEWIS: I'm just looking at my calendar,
15 your Honor. Your Honor, if I might, just only because I
16 have a commitment that I'm out the 24th to the 28th of
17 August, if I could have just a few extra days, that would
18 be great.

19 THE COURT: Is three weeks --

20 MR. LEWIS: Yes, sir.

21 THE COURT: -- three weeks sufficient? Okay.

22 MR. LEWIS: Yes, sir.

23 THE COURT: Now, you know, there's nothing
24 preventing the defendant from serving a document request
25 or interrogatory here, right, but it obviously -- it's

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1 subject to the same burden proportionality, relevance
2 limitation, what's good for the goose is good for the
3 gander, and I don't know if the defendants intend to
4 serve document requests but is that time frame sufficient
5 on your end, if we did it simultaneously?

6 MR. MATZ: It is, your Honor.

7 THE COURT: Okay. And then can we have -- can
8 I set the production of documents and, as well as
9 responses to these requests and interrogatories for
10 thirty days afterwards? In other words, so three weeks
11 to produce the affidavit, there weeks to do -- make the
12 document requests and demands -- I mean, excuse me,
13 document requests and interrogatories in a month to
14 respondent, provide the documents?

15 MR. MATZ: Your Honor, we believe that is
16 sufficient time. I would just note that unless Mr. Lewis
17 is able to formulate his requests in a manner consistent
18 with your Honor's guidance today, a slightly longer
19 period may allow an opportunity for the parties to seek
20 to negotiate and resolve any differences of opinion about
21 the appropriate scope of relevancy and proportionality,
22 but we can easily do thirty days, and if that's the
23 Court's preference, we will of course make it happen.

24 THE COURT: Well, okay, it's -- I'll do the
25 following. I set it at thirty days. If the parties need

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1 more time, we can deal with the request. I will point
2 out for both sides, right, the 2015 rule amendments to
3 the document requests will contemplate that the -- if a
4 party is withholding documents on the basis of an
5 objection, they're required to say so, which look, many
6 lawyers don't pay attention to this, which is generally
7 irksome to me, but it has a practical consequence in this
8 context which is, I think when -- I think, at least, the
9 defendant has some sense of what documents there are in
10 their client's possession, you know, it may be that one
11 side or the other's document requests are overbroad, and
12 beyond the scope, et cetera.

13 If, however, there are no documents that are
14 being withheld on the basis of that objection, you can
15 simply state the objection and say there are no documents
16 being withheld because there are none, based on a
17 reasonable search or whatever, and so I would encourage
18 you to do that, and that way this -- you know, perhaps
19 we're not fighting over theoretical objections. I hope
20 that makes sense.

21 MS. KAPLAN: Your Honor, this is Ms. Kaplan.
22 We understand all that. It makes total sense. One idea,
23 I just kind of have that may facilitate things, is as
24 probably you gleaned from our request for an extension,
25 which we appreciate in our letter, we have now been

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1 through, you know, her hard drives, and all that, and
2 have a sense -- a good sense of what's there, and one
3 thing we could certainly do within 30 days, or maybe
4 earlier, is produce the documents that we think would be
5 relevant to the CFA issue.

6 THE COURT: Well, I was going to suggest that
7 anyway --

8 MS. KAPLAN: Yeah.

9 THE COURT: -- irrespective of these document
10 requests, because you had made that offer, I was going to
11 suggest that that happen, if only to narrow what might be
12 asked for in addition.

13 MS. KAPLAN: We'd be happy to do that, your
14 Honor.

15 THE COURT: Okay. So that raises the question
16 of the redaction of information of -- sorry, let me be
17 more precise -- the redaction of personally identifiable
18 information in those documents. Does the plaintiff have
19 objection to that?

20 MR. LEWIS: Well, honestly, your Honor, if it
21 was more -- as I -- Mr. Matz and I had a couple of
22 conversations that he alluded to. There's redactions for
23 a completely unrelated person sharing a horrific
24 experience they went through that has nothing to do with
25 the list, we certainly have no objection to that person's

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1 identifying information being redacted. The only point
2 of redaction that I think we would derail would be if
3 there's someone specifically that we might need to get
4 third-party discovery from regarding the CDA issue,
5 particularly you know if someone's emailing about my
6 client, for example, those are the redactions that we
7 would not consent to, though we did note that we would
8 certainly be happy to sign any confidential --
9 confidentiality order -- sorry, your Honor, it's been a
10 long week.

11 THE COURT: That's okay.

12 MR. LEWIS: -- confidentiality order that your
13 Honor or if your Honor preferred, that the parties could
14 come to an agreement of an extremely extrinsic
15 confidentiality order, we'd certainly be happy to do
16 that.

17 THE COURT: Well, okay, so let me say this, I
18 thought this -- the issue I am about to raise next was
19 sort of -- I thought was going to come up at one point or
20 another, this is how we'll start at least on the
21 redaction. I'll permit the defendants to redact
22 information.

23 If you look at the content of the email or
24 whatever, and you want to challenge the redaction, the
25 parties can meet and confer, and then I'm not going to

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1 suggest a privilege log at this point because I assume it
2 will just say personally identifying information, and it
3 will be the same objections for every person, but -- so
4 I'm not going to require that but if there's a particular
5 redaction that you think is inappropriate, the parties
6 can meet and confer, and then if it needs to be raised to
7 me, it can be raised to me.

8 MR. LEWIS: Okay.

9 THE COURT: So we'll deal with it that way, in
10 the first instance, but as to this third-party discovery,
11 and frankly, you know, the parties will have to give me
12 some guidance on this, it is not clear to me at all,
13 okay, how much the third-parties actions bear upon a
14 defendant's ability to invoke the immunity.

15 In other words, if the question is what did Ms.
16 Donegan do, okay, it's not clear to me that the third-
17 party who gave the information is pertinent to this, if
18 you know what the information is that was provided.

19 In other words, if there's no information
20 provided, for example, other than, you know, a few words
21 or et cetera, and that can be identified, then I don't
22 know what the third-party has to do with the ability of
23 the defendant to invoke the immunity because the question
24 for the immunity is what did he or she do, in this case
25 she, what did she do with that information that was

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1 provided.

2 I don't know the answer to this question, and
3 it's both legal and factual, and I'm not even sure how
4 much it's a theoretical or an actual question here,
5 because there have been -- and I may have misconstrued
6 some of the prior history, so I apologize for that, there
7 may be some -- there be on the defendant's part, some
8 positions that have been staked out as to whether she
9 recalls from whom information was received, or ever knew,
10 in any event, which makes the immunity question really
11 about what she did, and perhaps what she did in a general
12 way, and how it -- so I'll hear first from the defendant
13 and then the plaintiff but the reference to the third-
14 party discovery, I am not sure, you know, why that's
15 relevant.

16 MR. MATZ: Your Honor, I think part of what's
17 going on here is that third-party is being used in two
18 different senses. In our letter, when we acknowledged
19 that Mr. Lewis might wish to undertake third-party
20 discovery, what we had in mind, based on our
21 conversations with him, and as indicated --

22 THE COURT: Well, Google, Snapchat, and other
23 social media, not the person who was the victim here, or
24 the putative victims.

25 MR. MATZ: Yes, exactly. It is emphatically

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1 our position that we see no need to involve other
2 individual third-parties, and to retraumatize them in the
3 context of this litigation, if they did communication
4 with Ms. Donegan about what, for them, may have been one
5 of the most sensitive, and painful experiences in their
6 lives.

7 We see no need for that, where the only
8 question is, what Ms. Donegan did. It's about her
9 conduct. It's not about her mental state, and it's not
10 about what anybody else did. It's just about what Ms.
11 Donegan did, and so for that reason --

12 THE COURT: But I --

13 MR. MATZ: -- we would separate out --

14 THE COURT: -- would you --

15 MR. MATZ: -- the two forums of third-party
16 discovery.

17 THE COURT: Understood. Would you agree,
18 however, it's both how -- you know, it's her conduct
19 about content in her possession, right? In other words,
20 you have to know the -- the actions that are being
21 described, it's about what is the -- they make sense in
22 the context of that she's taking those actions with
23 respect to something. It doesn't matter, I think, and
24 I'll hear from the plaintiff, what the third-party's
25 intent was, what the third-party's message was, even if

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1 the third-party asked Ms. Donegan to do certain things
2 with the information she provided hypothetically, if she
3 didn't do them, it's irrelevant to the immunity, right?
4 So you don't need to know the communications surrounding
5 the content, but you need to know perhaps what the basic
6 content was.

7 MR. MATZ: Yes, your Honor. And if I could
8 just propose something, I think the challenge as your
9 Honor has raised several times, is in the abstract, it
10 can be more challenging to think through the various
11 hypotheticals. It may be a lot more productive for the
12 parties to engage in the party discovery, and to then
13 assess in the context of very specific documents, if Mr.
14 Lewis concludes that on the basis of a specific document,
15 he thinks it appropriate to serve a third-party subpoena
16 on an individual, it might be a lot easier to work
17 through the questions that would be presented by that, in
18 a more particularized factual setting, than in a more
19 hypothetical posture, because I would suspect that any
20 analysis of that kind, if Mr. Lewis even comes to think
21 that such discovery was necessary, would very much depend
22 on exactly what the communication is, and when it's from,
23 and the extent to which there's any reason to believe
24 subpoenaing a person involved in that communication is
25 relevant, and necessary, and proportionate, and all that.

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1 THE COURT: Okay. Well, let me ask plaintiff's
2 counsel, I think the proposal is as follows. With
3 respect to individual, third-party discovery towards
4 individuals, we're basically going to punt for now. In
5 other words, the defendants will produce the documents in
6 their possession with redactions. If you believe a
7 redaction needs to be challenged, then work it out, if
8 you can't work it out, I'll decide it, and if on the
9 basis of any information you receive, either of that
10 tranche of documents, or in response to the document
11 requests or interrogatories, you believe it's appropriate
12 to subpoena a third-party individual, we could cross the
13 bridge about whether the defendants would agree or object
14 at that point. Are you okay with that?

15 MR. LEWIS: With punting? Yes, your Honor, if
16 we want to punt. The personal communications are --
17 yeah, we can deal with that --

18 THE COURT: Yes.

19 MR. LEWIS: -- later, but I do believe in Judge
20 DeArcy Hall's decision, we -- the personal communications
21 were noted to be something would be relevant but we could
22 certainly deal with that when we get to that bridge.

23 MR. MATZ: Well, your Honor, may I --

24 THE COURT: I think (indiscernible) refer to --
25 go ahead.

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1 MR. MATZ: Sorry. I was going to ask if I
2 could raise two very closely related points, but I don't
3 mean to take us off topic.

4 THE COURT: Well, let me just say this, I'm not
5 sure -- and let me just close this out. I'm not sure
6 what you mean by personal communications. If you're
7 talking about subpoenaing the third-party for the
8 communications sent to Ms. Donegan, or someone else about
9 the -- again, entry over concerning Mr. Elliott, I think
10 that too would be whether it's a deposition, which is
11 what I assume someone was talking about when they said
12 individual third-party deposition or documents, we'll put
13 that off.

14 I will say again, even a subpoena to a third-
15 party, you have to -- you know, the fact that their
16 personal communications are pertinent, I think (audio
17 interference) discuss all of issues then.

18 And then I assume that the -- whoever has a
19 phone on, please mute --

20 MR. LEWIS: Yes, I'm sorry, your Honor. I'm
21 trying to do that right now.

22 THE COURT: Yes, it's okay. If -- sorry, on
23 the third-party subpoenas to Google, et cetera, it sounds
24 like the parties are going to work cooperatively on that.
25 I'm not going to set a schedule for that, other than the

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1 sort of closing period for all of this discovery. Am I
2 wrong about that, that the parties are -- with respect to
3 that kind of third-party discovery, the parties are
4 working it out?

5 MR. MATZ: You're not wrong about that, your
6 Honor. I would just identify that as in the original
7 Google subpoena, which provided unmasking protections, it
8 will be our position again here, and hopefully Mr. Lewis
9 will agree again, as he did earlier, that affording
10 again, third parties who may be affected by the documents
11 that would be produced in response to any such subpoena,
12 that it would be important to afford them the unmasking
13 protections that he previously agreed to, and that your
14 Honor acknowledged, and adopted in entering the order,
15 governing the Google subpoena. And so our position as to
16 that would just be that we should follow the path we've
17 already walked down together.

18 THE COURT: Okay, so I'll let the parties work
19 out that, if you can't agree, I'll obviously decide it.

20 Okay. Raise the two issues that you wish to,
21 that were related.

22 MR. MATZ: Well, your Honor anticipated one of
23 them, which was that issue, so there's just the other one
24 left, which was about interrogatory responses, and
25 confirming that -- and again, this is maybe putting the

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1 cart before the hypothetical horse, or whatever the right
2 way to phrase it would be but making sure that the
3 redaction principals that we agree on would also apply to
4 interrogatory responses.

5 THE COURT: Well, let me say the following.
6 I'm not sure the plaintiffs agree with the redaction
7 principles. If you're talking about I'm permitting you
8 to redact in the first instance, the -- and then if they
9 want to challenge they can, yes, that applies to both
10 documents and interrogatories, and frankly, if it comes
11 to it, portions of the deposition transcript.

12 MR. MATZ: Thank you, your Honor. That all
13 sounds right, and those are the principles that we
14 understand. We will redact in the first instance, that
15 they can come to you, and challenge it, and that you
16 would then resolve it, potentially with notice, and an
17 opportunity for the affected individuals to be heard.

18 THE COURT: Right, and just to clarify that
19 slightly, I would hope that the parties meet and confer
20 about the redaction before coming to the Court because
21 maybe you can work it out, maybe you can provide a basis
22 that satisfies or, you know, some other accommodation can
23 be worked out.

24 If I set the close of all of this discovery
25 which admittedly also includes a deposition, is as

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1 October -- excuse me, I'm sorry -- October 30th, is that
2 too aggressive?

3 MR. LEWIS: I believe so, your Honor.

4 MR. MATZ: Obviously, the defense will
5 accommodate any deadlines, especially if it's on the
6 understanding that the parties can jointly move for an
7 extension if one proves to be necessary.

8 THE COURT: Okay. No criticism to lawyers, you
9 know, but as one who, you know, the New York State Bar
10 considers me retired from the practice of law, if you
11 didn't know judges were considered retired from the
12 practice of law, the work fills the space typically, so
13 I'm going to set October 30th. If we need to extend it,
14 I'm happy to either for COVID-related reasons or for
15 frankly, substantive reasons.

16 Is there --

17 MR. LEWIS: Thank you, your Honor.

18 THE COURT: What's plaintiff's position on the
19 length of a deposition?

20 MR. LEWIS: Of --

21 THE COURT: How about this? I realize it's a
22 little bit of a premature question, maybe you should get
23 the affidavit. You've seen the defendant's proposal on
24 the time line, I think, right? You've seen -- sorry, the
25 length of the deposition, and if both sides can't work

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1 that out, then I'll decide that.

2 MR. MATZ: Sounds good, your Honor.

3 MR. LEWIS: Thank you, your Honor. And can I
4 assume that your Honor would agree that a virtual or a
5 remote deposition is appropriate under the current
6 circumstances?

7 THE COURT: Yes. If -- I would hope the
8 parties would agree to that.

9 MR. LEWIS: Yes, sir.

10 THE COURT: And if they didn't, I would
11 strongly encourage it, and if necessary, require it, but
12 I'm -- you know, but --

13 MR. LEWIS: (Indiscernible).

14 THE COURT: -- we can obviously -- and if you
15 need help on working out the procedures, I'm happy to
16 work those things out with the parties.

17 On plaintiff's side, is there anything else we
18 wish to discuss?

19 MR. LEWIS: No, your Honor, I think -- well, I
20 believe the remaining things would fall under the cross
21 the bridge when we come to it, as far as communications,
22 and perhaps other issues, as far as obtaining other
23 communications, and it seems like, at least some would
24 not be in Ms. Donegan's possession --

25 THE COURT: Okay.

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1 MR. LEWIS: -- based on her practices
2 (indiscernible).

3 THE COURT: Okay. Anything else on defendant's
4 side?

5 MR. MATZ: No, your Honor. Thank you for
6 taking the time to hold this conference with us.

7 THE COURT: Okay, one last thing, just so the
8 parties are under a misapprehension, I do anticipate this
9 Google or other kind of internet service providers, or
10 other social media platform, that third-party discovery
11 to occur within this schedule. In other words, we
12 wouldn't be doing it afterwards. Obviously, if we need
13 to extend it because of that, we would do that but I do
14 -- you know, I would expect the parties to move forward
15 with their conversations, and that third-party work, you
16 know, as soon as possible.

17 MR. MATZ: Yes, your Honor.

18 MR. LEWIS: If might just note one thing, your
19 Honor, because I was thinking this when we cross the
20 bridge, but I do believe they're -- and we'll wait to see
21 what Ms. Donegan provides, but that there could be a
22 situation where obtaining communications from an
23 individual third-party could come into play. That's
24 where I thought the 10/30 date -- if there's going to be
25 motion practice surrounding that, would seem to be --

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1 that would be the thought in my mind, as to why it might
2 take some time if there are, for example, emails from Ms.
3 Donegan of encouragement that were sent to a third-party,
4 that would seem to be irrelevant for Mr. Elliot, so
5 that's the -- I think that was beyond just if there is,
6 you know, ISPs and google subpoenas, those were the
7 third-party discovery tools that I thought could very
8 well come into play, considering Ms. Donegan has deleted
9 at least a portion of these types of relevant documents.

10 THE COURT: Okay. Well, all I will say about
11 that, at this point is, I think you should, you know --
12 obviously before 10/30, you should tee-up the issue with
13 me --

14 MR. LEWIS: Yes, Judge.

15 THE COURT: -- if the issue needs to be teed-
16 up. Obviously if I need to extend the schedule, I would,
17 you know, and we'll cross the bridge another --

18 MR. LEWIS: Whatever metaphor we have.

19 THE COURT: -- yeah, but -- yeah, exactly, and
20 you know, on the encouragement, I'll just point out, you
21 know, bottom of page 23, top of 24, Judge DeArcy Hall
22 appears to limit the encouragement of things that would
23 pertain to the twelve-hour juncture. We can debate that
24 in the context of what comes up but I just bookmark that
25 for our future conversations.

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1 Okay. I wish all of you and your families good
2 health. Take care.

3 MR. MATZ: Thank you, your Honor.

4 MR. LEWIS: Thank you.

5 (Matter Concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 24th day of July, 2020.


Linda Ferrara

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